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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 970

BINKLEY MINING COMPANY OF MISSOURI, PETITIONER

v.

DAN H. WHEELER, ACTING DIRECTOR,[1] BITUMINOUS COAL DIVISION, UNITED STATES DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The report of the examiner and the memorandum opinion and order of the Acting Director

[1] On September 10, 1942, respondent Dan H. Wheeler was appointed Director of the Bituminous Coal Division. Previously, he had served as Acting Director while the position of Director was occupied by Howard A. Gray. Although many of the administrative actions in the proceedings herein involved had taken place before respondent Dan H. Wheeler assumed his present office, for convenience all action by the head of the Division is referred to in this brief and in our brief in No. 971 as action of the Director.

of the Bituminous Coal Division approving and adopting the report of the examiner are set forth in the record (R. 116–123, 140–148). The opinion of the Circuit Court of Appeals (R. 153–169) is reported in 133 F. (2d) 863.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 170) was entered on March 5, 1943. The petition for writ of certiorari was filed on April 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The petition appears to raise two basic questions:

1. Whether the court below properly affirmed the refusal of the Director of the Bituminous Coal Division to terminate a proceeding on a complaint which alleged willful violations by petitioner of the minimum price provisions of the Bituminous Coal Act and the Bituminous Coal Code, and which was filed pursuant to Sections 4 II (j) and 5 (b) of the Act by Bituminous Coal Producers Board for District No. 15, where the District Board subsequently sought termination of the proceeding by withdrawal or dismissal of the complaint.

2. Whether the court below properly affirmed the order of the Acting Director holding that the

petitioner "willfully" violated certain minimum price provisions of the Act and Code and directing it to cease and desist from further violation.

STATUTE INVOLVED

The pertinent provisions of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, 15 U. S. C., sec. 828 et seq., as amended, are set forth in the appendix, *infra,* pp. 19–22.[2]

STATEMENT

On June 12, 1941, the Bituminous Coal Producers Board for District No. 15 (hereafter called District Board 15) filed a complaint with the Bituminous Coal Division, pursuant to the provisions of Section 4 II (j) and 5 (b) of the Act, alleging that petitioner, through a subsales agent, made certain sales of coal to Western Tablet and Stationery Company at prices less than the applicable minimum prices established by the Division, and thus willfully violated the provisions of the Bituminous Coal Code and rules and regulations issued thereunder (R. 10–14). The complaint requested that the Division either revoke the code membership of petitioner or in its discretion direct petitioner to cease and desist from further violations. On July 12, 1941, a hearing on the complaint was scheduled for September

[2] The original Act has been extended by amendment, April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, sec. 849, and April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113.

10, 1941, in Kansas City, Missouri, and due notice was given to interested persons (R. 14–16). Personal service was made on petitioner (R. 17–18). Issue was joined when on August 2, 1941, petitioner filed an answer generally denying the allegations of the complaint (R. 18–19).

By motion, dated August 25, 1941, District Board 15 sought to withdraw its complaint and cancel the scheduled hearing (R. 19–24). The Director, observing that the proper administration of the Act required that the hearing be held, denied this motion September 5, 1941, without prejudice to petitioner's right to renew it at the close of the hearing (R. 24–25). The scheduled public hearing was thereupon held on September 10 and 11, 1941, before a duly designated examiner of the Division (R. 27–115). District Board 15 and petitioner appeared and filed a joint stipulation to dismiss the proceeding, which was referred to the Director (R. 26, 28). Upon complainant's refusal to introduce such evidence as it had in its possession (R. 28–35), a representative of the General Counsel's office of the Division obtained leave from the examiner to introduce evidence in the possession of the Division bearing upon petitioner's alleged violations (R. 35, 39). With respect to all such evidence which was introduced, petitioner fully exercised its right of cross-examination (R. 39–115). On February 25, 1942, the examiner submitted his report in which he

found that petitioner had willfully violated the provisions of the Act, the Code and the Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck. The examiner recommended that an order be entered requiring petitioner to cease and desist from further violations (R. 116–123).[3]

Petitioner filed exceptions (R. 127–131) to the report. The Director, on June 4, 1942, in a memorandum opinion and order (R. 140–148), denied the exceptions and approved and adopted the findings and conclusions set forth in the examiner's report. The following facts appear from the administrative findings and the undisputed evidence adduced at the hearing:

Petitioner, Binkley Mining Company of Missouri, operates the Bee-Veer Mine, designated as Mine Index No. 13, located in Macon County, Missouri, in District No. 15 (R. 2, 39). At all times pertinent to this proceeding, petitioner has been a member of the Bituminous Coal Code. It produces about half a million tons of coal a year (R. 96). Among the consumers of coal produced by petitioner is Western Tablet and Stationery Company (hereafter called Western), a corporation engaged in the manufacture of stationery items, whose main

[3] The report of the examiner treated this proceeding and the one involved in No. 971 in a single consolidated report because the transactions involved were similar and concerned the same producer. The Director followed the same procedure.

plant is located at St. Joseph, Missouri (R. 43). In the operations of this plant, Western annually consumes approximately 2,000 to 3,000 tons of bituminous coal (R. 44, 51, 79, 114). Part of this coal is used for processing glue and part for heating three plant buildings (R. 44–48, 67–69, 76, 87–88, 113). During the cold season, which generally extends from October through March of each year, approximately 20 percent of the coal consumed is used for processing glue, and the remaining 80 percent is used for space heating (R. 47, 74, 107–108, 112, 113). During that season, even on days when the plant is not operating, the boiler is kept going in order to maintain a temperature high enough to prevent the sprinkler system from freezing (R. 81). During the warm season, which generally extends from April through September, all the coal consumed is used for processing glue (R. 112–113). Approximately three tons of coal are used each day during the entire year for processing purposes (R. 79, 112). The plant generally operates 275 to 325 days a year; in 1940, it operated approximately 275 or 280 days (R. 79–80).

Between October 1, 1940 and March 31, 1941, petitioner, through its subsales agent, Binkley Coal Company, sold to Western approximately 540 tons of 1¼″ washed mill coal (designated in the applicable Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck as Size Group 13) at a price of

$1.63 per net ton f. o. b. its Bee-Veer Mine (R. 57–59, 92). This coal was sold pursuant to a contract entered into on April 1, 1940, for a term of thirty days, renewable each thirty days and terminable upon the establishment of minimum prices under the Act, or March 31, 1941, whichever occurred first; in accordance with the rules and regulations of the Division and Section 4 II (e) of the Act, the contract was made subject to all the provisions of the Act and specifically provided that where minimum prices were established under the Act, the contract might be renewed at the then effective minimum prices (R. 51–55).

It had been petitioner's practice, even before minimum prices were established by the Division, to sell coal to domestic and commercial consumers at prices different from those applicable to industrial consumers (R. 93–95). At the time the contract was executed, petitioner considered Western an industrial consumer in accordance with the classification embodied in the price list of Southwestern Coal Company, the marketing agency of which petitioner was a member and through which it sold its coal (R. 86–87, 92–95). The rules of that agency provided that consumers using fuel each day for processing and manufacturing, were to be classified as industrial consumers (R. 87). The minimum price schedule promulgated by the Division pursuant to the

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price provisions of the Act, which became effective October 1, 1940, also provided for classification of consumers in accordance with the marketing practice of the region in which petitioner marketed its coal. The Division's classification of consumers, however, was more rigorous; in order that the industrial classification might apply, not only must the fuel be needed each day of the year when products of the consumer are produced, but it must be used principally for the purpose of manufacturing or processing.[4]

In the light of this price instruction, the applicable minimum price for 1¼″ washed mill coal produced at petitioner's mine and sold to Western principally for space heating use in its St. Joseph plant was $1.75 per ton f. o. b. the

[4] So far as here pertinent, Price Instruction No. 9 of the Division's minimum price schedule provides:

"PART I—DOMESTIC AND COMMERCIAL USE AND INDUSTRIAL USE

"(a) Prices shown for Domestic and Commercial Use apply (1) on all sales in retailing of coal. (2) On all sales of coal to consumers using coal principally for space heating. (3) On all other sales except Industrial Use and as provided for in Part II Special Purpose Use and Part III Railroad Locomotive Fuel Use.

"(b) Prices in the Industrial Use Schedule apply only where sale is made by the Producer Code Member, his authorized agent, or a registered wholesaler or jobber and where the coal moves direct from the mine of the producer to the consumer using the fuel principally for (1) the purpose of driving steam engines or turbines. (2) The purpose of manufacturing or processing if fuel is required each day of the year products of the consumer are produced."

mine, the minimum price applicable during the period involved for coal sold for domestic and commercial use, rather than industrial use (R. 122, 146–147). The price of $1.63 per ton f. o. b. the mine, at which petitioner sold the coal in question, was the minimum price then applicable to coal sold for industrial use.

William G. Gregory, vice president of petitioner and of its subsales agent, Binkley Coal Company, and general manager of petitioner's Western Division, who was directly in charge of the sale of petitioner's coal to Western during the period in question (R. 91–94), was at that time and still is an active member of District Board 15. He stated he was familiar with the Schedule of Effective Minimum Prices for District No. 15, the Marketing Rules and Regulations promulgated by the Division and particularly the provisions of Price Instruction No. 9 (R. 93). When the schedules of effective minimum prices became effective October 1940, petitioner sent copies of the Division's rules and regulations, prices, and incidental information to all its salesmen advising them to study such rules and provisions carefully and to comply with the law in every respect (R. 96). Thomas E. Ziph, a salesman under Gregory's supervision who represented petitioner in its transactions with Western, was likewise aware of the price schedule, price instruction, and the marketing rules of the Divi-

sion (R. 88). Ziph testified that it was his understanding "that the larger portion of the coal that they [Western] use [in the St. Joseph plant] was for heating their buildings" (R. 87, 88, 119, 146–147). Notwithstanding Ziph's knowledge of Price Instruction No. 9, and the fact that he called on Western once every two or three weeks (R. 84), he made no inquiry or investigation to determine whether Western was an industrial user of coal within the meaning of the price instruction and the applicable rules and regulations of the Division (R. 119, 146).

Under these circumstances, the Director found that petitioner should have sold its 1¼" washed mill coal to Western at $1.75 per ton f. o. b. the mine rather than $1.63 per ton f. o. b. the mine, in view of the fact that the coal was used principally for domestic or commercial purposes. He found that petitioner's failure "to make any effort to determine the use to which the coals were to be put" amounted to a "wilful disregard" of its obligations (R. 147). He accordingly found that petitioner's violation was willful within the meaning of the Act.

The Director likewise held that upon the filing of the complaint by District Board 15, the jurisdiction of the Division was invoked to determine whether or not willful violations of the Act had been committed. Despite the desire of District Board 15 to withdraw its complaint or to have

the proceeding dismissed, the Director held that the Division could properly proceed to determine the issues raised in the complaint. Pointing out that where a district board fails for any reason to take action authorized or required by the Act, Section 6 (a) empowers the Divison to take such action in lieu of the district board, the Director held that it was proper for representatives of the Division to participate in the proceeding and to assure a full exploration and development of the issues and pertinent evidence. (R. 143, 144.)

The Circuit Court of Appeals affirmed the order of the Director requiring petititioner to cease and desist from further violations (R. 152–170). The Court pointed out that there is a "public interest in the enforcement of the requirements of the Act" and that neither "the petitioner nor the local board nor both in concert could control the public interest by stipulation or dismissal" (R. 165, 166). The court further held that the "finding that petitioner committed the violation as charged is sustained by the evidence" (R. 166), and concluded that there was, likewise, substantial evidence to support the finding that the violation was "wilful" within the meaning of the Act (R. 169).

ARGUMENT

1. The first question raised by the petition is whether the court below properly held that the Director of the Division was authorized to con-

tinue a proceeding instituted upon complaint of District Board 15 to investigate and redress alleged willful violations of the minimum price provisions of the Act and Code, despite the fact that the Board subsequently sought to have the complaint dismissed or withdrawn. Petitioner urges that a complainant's right to withdraw a complaint is "individual and private" (Pet. 10) and may be exercised "at any time prior to judgment" (Pet. 11). When so exercised, petitioner contends, the Division lacks power to continue the proceeding.

The same contentions were repeatedly made by petitioner and rejected by the examiner, the Director and the court below. They ignore the fundamental fact that, although the Bituminous Coal Act of 1937 contemplates a high degree of industrial self-regulation, Congress has designated the Division as the ultimate guardian of the public interest, *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 387, 399. It is the Division which maintains surveillance over the members of the Code as well as over the District Boards. It is the Division which has the responsibility of reconciling frequently conflicting interests among competitors, of giving adequate protection to consumers and of administering and enforcing the Act so as to protect the interests of the public and to effectuate the Congressional objectives. Consequently, in a proceeding aimed at the enforcement of the minimum price provisions of the Act, no less than in a pro-

ceeding aimed at determining the scope of their applicability, there are "other interests than those of the petitioner" involved and the Division is clearly not required to permit such interests to go unheeded. See *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 105 F. (2d) 559, 566 (C. C. A. 8th), certiorari denied, 308 U. S. 604, rehearing denied, 308 U. S. 638. Refusal to dismiss a proceeding against a violator may, as here, vindicate the interests of all those directly or indirectly affected by price-cutting activities.

This Court has observed that rules developed in purely private litigation frequently have limited relevance in administrative proceedings for the protection of the public interest. See, *e. g., National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362–363; *Phelps Dodge Corporation* v. *National Labor Relations Board,* 313 U. S. 177, 193; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–144. In a proceeding designed to safeguard the integrity of the minimum price schedules promulgated by the Division and thus to protect competitors and the general public from unregulated competition and discrimination, there is little reason to regard a complaint filed by a District Board in the same light as a private pleading.[5] In

[5] The right of a private litigant to abandon his action, over his adversary's objection, has not infrequently been limited by statute or court rule. See, *e. g.,* Rule 41 (a) of the Rules of Civil Procedure for the District Courts of the United

view of the fact that the District Boards are expressly authorized in Sections 4 II (j) and 5 (b) of the Act to file complaints alleging willful violations of the Code, and that the Division is authorized by Section 6 (a) to take action in lieu of the District Board when it fails to act "for any reason," it seems clear that the complaint filed pursuant to Sections 4 II (j) and 5 (b) of the Act "merely sets in motion the machinery of an inquiry" and that the subsequent fate of the inquiry is not limited by the desires of the complainant. Cf. *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, October Term 1942, No. 73, p. 6; see also *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, 105 F. (2d), 559, 565–566 (C. C. A. 8th), certiorari denied, 308 U. S. 604, rehearing denied, 308 U. S. 638; *Resources Corporation International* v. *Securities and Exchange Commission*, 103 F. (2d) 929, 932 (App. D. C.); *Oklahoma-Texas Trust* v. *Securities and Exchange Commission*, 100 F. (2d) 888, 892 (C. C. A. 10th); *Securities and Exchange Commission* v. *Hoover*, 25 F. Supp, 484 (N. D. Ill.); Cf. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1.[6]

States; *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230.

[6] Once District Board 15 indicated to the Division that it was unwilling to participate in a proceeding against a company producing coal within the District, the vice president of which was a member of the Board itself, the Division was clearly empowered to continue with a hearing which it deemed necessary to the effective enforcement of the Act. At

The Division's function in vindicating the public interest is emphasized by a number of factors: complaints under sections 4 II (j) and 5 (b) may be lodged by a variety of agencies, private or public; the notice to the alleged violator is the Division's notice, based on a complaint consisting of a filled-in form furnished by the Division (R. 10–14, 14–16); the sanctions provided by section 5 (b)—suspension of code membership or an order to cease and desist—go beyond the mere redress of a private grievance; and the Division is charged in section 5 (b) with the responsibility of bringing proceedings in court to enforce any order that it may enter. Cf. *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261.

2. Petitioner also challenges the conclusion of the court below that the Director's finding that petitioner had willfully violated the minimum price provisions of the Act is supported by substantial evidence. Petitioner does not deny that the evidence introduced at the hearing established that it sold a substantial quantity of coal at less than the applicable minimum price estab-

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such a hearing it was appropriate that a representative of the Office of the General Counsel participate. Such a course has been recommended to the Attorney General's committee by staff members preparing a monograph of the activities of the Division: "Active participation by the Division counsel, at least to assure a full record after the required complaint has put the agency's machinery in motion, would seem preferable to abandonment of public rights to private prosecution." Sen. Doc. No. 10, Part 10, 77th Cong., 1st Sess., p. 46 (1941).

lished in the price schedules duly promulgated by the Division (Pet. 12). Petitioner argues, rather, that the violation was not shown to have been "willful." As this Court has recently pointed out, " 'willful' * * * is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U. S. 492, 497. When employed in criminal statutes, particularly those involving moral turpitude, the word is generally used to mean with evil purpose or criminal intent. *United States* v. *Murdock,* 290 U. S. 389, 394, and cases cited. But when used in denouncing acts not conventionally reprehensible in themselves, the term has been held to denote that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and is employed to characterize "conduct marked by careless disregard for whether or not one has the right so to act." *United States* v. *Illinois Central Railroad Co.,* 303 U. S. 239, 243; *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69, 71 (C. C. A. 8th). In other circumstances, willfulness involves a mere failure to observe a known statute by reason of indifference, inadvertence, or negligence. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 85, 86; *Powell* v. *United States,* 112 F. (2d) 764 (C. C. A. 4th); *Boston & M. R. R.* v. *United States,* 117 F. (2d) 428 (C. C. A. 1st); *Arrow Distilleries* v. *Alexander,* 109 F. (2d) 397, 406 (C. C. A. 7th), certiorari denied, 310 U. S. 646.

To avoid a tax of 19½ percent on sales of the coal which it produced, petitioner accepted membership in the Bituminous Coal Code and undertook to observe the minimum prices and regulations established by the Division. Despite the fact that its responsible employees were aware of the requirements of the price schedule and the distinction made by Price Instruction No. 9 between coal sold for domestic or commercial use and coal sold for industrial use, and despite the fact that petitioner had adequate opportunity to ascertain by simple inquiry the character of Western's use of the coal which it purchased, petitioner made no attempt to determine the appropriate minimum price for its sales to Western. Finding that "proper enforcement of the Act would be impossible" if producers were permitted to sell coal without determining the use to which the coals are to be put where such use affects the applicable minimum price, the Director held that petitioner's violations were to be regarded as "Wilful" in the context of the Bituminous Coal Act of 1937 (R. 147). The court below (R. 168) confirmed the Director's judgment that in the Act the term "wilful" did not require evil or criminal purpose but, rather, was designed to described the attitude of a member of the Code "skilled in the coal selling art and familiar with its practice, who, having a free will and choice, intentionally and knowingly either omits to do what is required of him * * * or acts * * *

with manifest indifference" to the obligations of code membership. In so holding, the court followed established rules of construction and principles governing judicial review of administrative orders. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Gray* v. *Powell,* 314 U. S. 402.[7]

CONCLUSION

The judgment below is correct and is in accordance with the decisions of this and other courts. The petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, Department of the Interior.

ARNOLD LEVY,
General Counsel,

JESSE B. MESSITTE,
Assistant General Counsel,

ERWIN B. ELLMANN,
Attorney,
Bituminous Coal Division,
Department of the Interior.

MAY 1943.

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[7] Although the court criticised the form of the administrative findings, it recognized that they are legally sufficient. See *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 428; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 294 U. S. 499; *National Labor Relations Board* v. *Swift & Co.,* 116 F. (2d) 143, 145 (C. C. A. 8th); *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 560 (App. D. C.).